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Supreme Court of the United States

OCTOBER TERM—1965

No. 523

ANTHONY ALBANESE,

Petitioner,

against

N.V. NEDERL. AMERIK STOOMV. MAATS.,

Respondent,

against

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Co-Petitioner.

OBJECTION TO FILING OF BRIEF OF *AMICUS CURIAE* IN FAVOR OF PETITIONER AND BRIEF IN OPPOSITION

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On the Brief.

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Respondent objects to the filing of the brief of American Trial Lawyers Association, Admiralty Section, by Arthur J. Mandell, in favor of petitioner, and has withheld consent to the filing of such brief for the following reasons:

(1) The applicant has no sufficient interest in the outcome of this litigation to be entitled to be heard as *Amicus Curiae*. He does not represent any labor or industrial association but merely an association of attorneys representing personal injury litigants in the maritime field.

(2) The application for leave to file fails to comply with Rule 42.3 of this Court in that it fails to set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties.

(3) The brief of *Amicus Curiae* merely presents a restatement and reargument of the matters contained in the petition for a writ of certiorari filed by the petitioner herein.

Brief in Opposition

I

The brief of *Amicus Curiae* seeks to support petitioner's contention that a longshoreman is entitled to a higher standard of care than that applicable to other persons lawfully on board the owner's vessel, by resort to Jones Act and F.E.L.A. cases.

The notion that there is an absolute nondelegable duty on the part of a shipowner with respect to the employees of independent contractors on board his vessel to perform work which their employer had contracted to perform for the shipowner, was expressly repudiated by this Court in *West* v. *United States,* 361 U. S. 118, 122-123. That the duty of the employer to his employees under the Jones Act and the F.E.L.A. extends beyond and is greater than the general common law duty of care, was noted by this Court in *Kernan* v. *American Dredging Co.,* 355 U. S. 426, 432.

All of the cases cited by *Amicus Curiae* in support of his position, cited at page 5 of his brief, are Jones Act or F.E.L.A. cases with the one exception of *U.S.F. & G.* v. *U.S.A.* 152 F. 2d 46, and no support whatever will be found in that decision for the statement made by *Amicus Curiae,* that the issue of the shipowner's negligence must be left to the jury if "even the slightest" negligence on its part

played any part in producing plaintiff's injury. That case was an admiralty case and obviously, therefore, had nothing whatever to do with what constitutes sufficient proof for a jury question of reasonable care. Moreover, in that case the only negligence that was involved was the shipowner's negligence in respect of the ship's Jacob's ladder which was in the ship's sole possession and control.

What is here sought to be advanced by *Amicus Curiae* is the identical notion which was struck down by this Court in *West*. This is apparent from the following language in the brief of *Amicus Curiae* (p. 7): "It is incumbent upon the shipowner to discharge his non-delegable duty to supply a safe place in which to work. * * * if the area where longshoremen are working, becomes an unsafe place to work, be it through the act of the stevedoring contractor or anyone else, if this condition is the cause of an injury, the shipowner is liable." This is an apparent attempt to infuse into the law of negligence an absolute duty on the part of the shipowner to provide a safe place to work apart from fault, thus imposing upon the shipowner a burden even greater than the warranty of seaworthiness, which depends upon reasonable fitness for use, and making the shipowner the absolute guarantor or insurer of the longshoremen's safety. Apparently the association of maritime personal injury litigant attorneys is unwilling to accept the unanimous decision rendered by this Court in 1959 in *West*.

II

Amicus Curiae seek to treat the Safety and Health Regulations for Longshoring, adopted by the Secretary of Labor pursuant to statutory authority under the Longshoremen's and Harbor Workers' Compensation Act as if the Regulations now establish a definition of "negligence or unseaworthiness" binding upon the shipowner. Adopted as they were, under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. Sec. 941,

et seq., they obviously could not impose statutory obligations upon the shipowner unless he were the employer of labor covered under the Act, and naturally the Regulations, by their terms, so provide.

While purporting to give lip service to these necessary limitations of the Regulations, as respects a shipowner, *Amicus Curiae* nevertheless make the unsupported statement that: "The failure to comply with and meet these standards creates an unsafe place to work" (p. 6) and renders the shipowner liable if he fails "to discover them, and then to remedy them" (p. 7). It was precisely this erroneous contention, advanced by petitioner and co-petitioner which was accepted by the trial court, but rejected by the Court of Appeals. Respondent never contended that the Regulations were not entitled to any evidential value under appropriate circumstances when properly applied (as suggested by *Amicus Curiae* at page 7). Respondent did contend, unsuccessfully in the district court, but successfully in the Court of Appeals, that the use petitioner and co-petitioner sought to make of the Regutions was erroneous.

Of the cases cited by *Amicus Curiae* (at p. 8) only the following involve the Safety and Health Regulations. *Provenza* v. *American Export Lines, Inc.*, 324 F. 2d 660; *Skipper* v. *Amerind Shipping Corp.*, 230 F. Supp. 253; *United States* v. *Grace Line, Inc.*, 221 F. Supp. 39; *Ray* v. *Compania Naviera Continental S.A.*, 203 F. Supp. 206.

As pointed out in respondent's brief in opposition to the petition, there is no conflict between the decision of the court below and the decision of the Fourth Circuit in *Provenza*. Respondent does not question that *Provenza* outlined a proper and appropriate use of the Regulations as evidence which the trier of the facts may consider in determining whether or not the stevedore in his operations has or has not rendered the ship unseaworthy; for which, of course, the owner could be liable under the *Sieracki* doctrine.

There is nothing in *Skipper* v. *Amerind Shipping Corp., supra,* which justifies a different treatment for the use of the Regulations as against the shipowner. See *Deffes* v. *Federal Barge Lines, Inc.,* 229 F. Supp. 719, 721.

United States v. *Grace Line, Inc.* involved a proceeding by the United States for a permanent injunction to restrain Grace Line, as an employer of longshoremen, against violations of the Safety and Health Regulations pursuant to Section 41(e) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 941(e). The case obviously has not the slightest relevancy to the question presented at bar.

Ray v. *Compania Naviera Continental S.A.* involved a use of the Regulations as against the stevedore on a claim for indemnity (203 F. Supp. at p. 210). Again, this case is of no relevancy on the question here presented.

None of the cases cited by *Amicus Curiae* in the first paragraph on page 9 of his brief have even the slightest application to the problem here presented, except *Gainar* v. *S.S. Longview Victory,* 226 F. Supp. 912. They have to deal with the question of the correction of an unseaworthy condition created in the vessel by the stevedore's methods of operation, as in *Scott;* with the question of the liability of a shipowner in negligence where he knowingly allows a stevedore to employ an obviously unsafe method of removing the ship's cargo from the hold of the vessel, as in *Hroncich* and *Ferrante,* or of breaking open the ship's dunnage, as in *Aldridge.* The question in the present case as regards plaintiff's petition is whether a shipowner may be held liable in negligence on the basis that an unsafe condition which was created in the place of work by an instrumentality employed by the stevedore, had existed for a sufficient length of time to charge the shipowner with notice of it, although he did not in fact have knowledge thereof.

Gutierrez has been sufficiently discussed in respondent's brief in opposition to plaintiff's petition to render further discussion unduly repetitious. *Peterson,* of course, has no application on the question of negligence, relating as it does to the question of unseaworthiness by incorporation into a ship's gear of a defective instrumentality.

Dixon, again, is a Jones Act case. It could be expected that counsel learned in the field of maritime personal injury law would refrain from confusing seamen's Jones Act cases with longshoremen's diversity cases, but apparently this expectation is naive. That Jones Act principles have no application to longshoremen's diversity cases has been too often stated to bear further repetition.

CONCLUSION

For the foregoing reasons, the motion of American Trial Lawyers Association, Admiralty Section, by Arthur J. Mandell, for leave to file a brief *Amicus Curiae* on behalf of petitioner herein, should be denied.

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